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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

CHRISTIAN MATTHEW NEWTON and
JOHN JACKSON MILLER TRUXELL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision below, validating the use of co-conspirator hearsay statements as evidence against Petitioners, conflicts with other appellate decisions and results in a deprivation of due process where there was a complete absence of substantial, independent evidence that Petitioners were members of the charged conspiracy?

2. Whether the decision below affirming Petitioners' convictions is contrary to prevailing law and results in a deprivation of constitutional rights, where the evidence did not sufficiently establish their knowing participation in the charged crimes?

3. Whether a sentencing court's mechanical imposition of maximum sentences without individualized

consideration of relevant behavior characteristics requires resentencing before an impartial judge?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioners, their families, and the United States of America.

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CHRISTIAN MATTHEW NEWTON and
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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petitioners, CHRISTIAN MATTHEW NEWTON and JOHN JACKSON MILLER TRUXELL, respectfully pray that a Writ of Certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on August 5, 1982, and October 19, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix attached hereto and is reported as United States v. Roper, 681 F.2d 1354 (11th Cir. 1982). The Court of Appeals denied the petition for rehearing in a per curiam order dated October 19, 1982, which is also reproduced in the Appendix. The District Court did not render any written opinions specifically directed to this case.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered August 5, 1982. The appellate court then entered an order staying issuance of the mandate pending the timely filing of a certiorari petition and disposition thereof by this Court. This petition is filed within the

authorized time period. Jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person... shall be deprived of life, liberty, or property without due process of law...

Title 21 U.S.C. §841:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;...

Title 21 U.S.C. §846:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Christian Matthew NEWTON and John Jackson Miller TRUXELL, along with co-defendants Jerry Lee Harvey, Tyrus Ramond Cobb, James Morrow Roper and Geraldine Kelleher Martin, were charged by a federal grand jury in the Southern District of Alabama with conspiracy to possess and distribute approximately 100,000 methaquaalone tablets and the substantive offense of possession and distribution of the drugs. 21 U.S.C. §§846, 841(a)(1). Before the trial, the district court granted Harvey's motion for a severance from the other defendants and at the conclusion of the government's case-in-chief judgments of acquittal were entered for codefendants Martin and Roper as to the substantive charge. The jury then found all of the defendants guilty of conspiracy and

TRUXELL, NEWTON and Cobb guilty of possession with intent to distribute. NEWTON and TRUXELL received maximum sentences of five years on each count, to run consecutively, coupled with total fines of $30,000.

The government's investigation of this case began with Frank Acuian, a cooperating informant for the Drug Enforcement Administration (DEA), who was approached by Ty Cobb for the purpose of soliciting potential buyers for large amounts of quaaludes. Convinced that Cobb was capable of producing the drugs, Acuian contacted the Baton Rouge Police Department, which in turn notified the DEA. Acuian met with DEA agents and agreed to assist in making a drug bust. He then began negotiating for the sale of a large amount of quaaludes. An undercover Louisiana state trooper was introduced

to Cobb as the "money man" and, as a gesture of good faith, Cobb was shown $200,000.00 in cash.

The parties then decided on Mobile, Alabama as the site of the sale. Cobb and Martin, his girlfriend, then checked into the Howard Johnson's Motor Lodge (Howard Johnson's) in Mobile and were soon joined by Harvey, who was to assume an increasingly important role in the negotiations.

After a series of meetings at which the price and method of exchange were settled, Harvey made airline reservations for "Jack Wilson" to fly from Atlanta to Mobile. "Wilson", it was explained, was to transport the purchase money to Atlanta after the exchange. Harvey drove to the airport to pick up "Wilson", who turned out to be the defendant Roper. On the way back to the hotel, Harvey made a phone call

in Roper's presence to Harvey's "Florida connection" at a Travelodge in Ocala, Florida. The person Harvey called was named "Steve." Although NEWTON and TRUXELL were alleged to be the Florida connection, they were never observed at or connected to the Travelodge motel.

The next day, when the deal was ready to be consummated, a call was placed to the Travelodge in Ocala to request delivery of the pills. The first observation of NEWTON and TRUXELL came as they drove a white Chevrolet into the Howard Johnson's parking lot. The only connection between these two men and the Ocala Travelodge is that the car driven by NEWTON and TRUXELL was the same one registered to occupants at the Travelodge who had checked out the day earlier. Upon their arrival at the Howard Johnson's, four sealed cartons were quickly transferred to Acuian's

car. NEWTON and TRUXELL then conferred with Cobb for a few minutes before driving away. They were arrested on the highway and a road map was seized from TRUXELL's person.

Meanwhile, back at the Howard Johnson's, teams of agents began arresting the other conspirators. The sealed boxes which NEWTON and TRUXELL had delivered contained 105,300 methaquaalone tablets.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, VALIDATING THE USE OF COCONSPIRATOR HEARSAY STATEMENTS AS EVIDENCE AGAINST PETITIONERS, CONFLICTS WITH OTHER APPELLATE DECISIONS AND DEPRIVES PETITIONERS OF DUE PROCESS WHERE THERE WAS A COMPLETE ABSENCE OF SUBSTANTIAL, INDEPENDENT EVIDENCE THAT PETITIONERS WERE MEMBERS OF THE CHARGED CONSPIRACY.

NEWTON and TRUXELL were charged with, and convicted of,

conspiring to possess and distribute 100,000 methaqualone tablets and the substantive offense of possession and distribution of the contraband. The evidence against them was wholly circumstantial, as recognized by the Eleventh Circuit, 681 F.2d at 1359, and included consideration of certain coconspirator hearsay statements. In determining whether such statements can be admitted as evidence against a particular defendant, the proof apart from the use of the hearsay statements must establish by a preponderance of the evidence the existence of the charged conspiracy and a defendant's participation therein. E.g., United States v. James, 590 F.2d 575 (5th Cir. en banc), cert. denied, 442 U.S. 917 (1979); United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977).

The appellate opinion in this

case refused to recognize the fact that coconspirator hearsay was admitted against these Petitioners. 681 F.2d at 1358-1360. This portion of the Eleventh Circuit opinion is clearly in conflict with numerous federal appellate decisions which define coconspirator hearsay statements as out of court statements by a coconspirator of a party made during the course and in furtherance of the conspiracy. F.R.E. 801(d)(2)(E); United States v. DiGregorio, 605 F.2d 1184 (1st Cir.), cert. denied, 444 U.S. 937, 100 S.Ct. 287 (1979); United States v. DiRodio, 565 F.2d 573 (9th Cir. 1977); United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933, 97 S.Ct. 2641 (1977). Because statements of the alleged coconspirators, such as references to the "Florida connection" and the

existence of the refrigerated truck containing contraband, contributed to the quantum of proof against NEWTON and TRUXELL, the evidence could not be considered until the predicate elements were satisfied. The appellate opinion's conclusion in this regard is erroneous and constitutes an injustice. This Court ought to correct the matter.

The Fourth Circuit decision in United States v. Stroupe, 583 F.2d 1063 (4th Cir. 1976), is perhaps representative of prevailing legal authority on this point. There, the court ruled that the independent evidence connecting the defendant to a conspiracy was inadequate and precluded admission of any coconspirator statements. Wayne Stroupe was convicted, on a conspiracy theory, of distributing amphetamines. The evidence showing Stroupe's involvement in an

otherwise ongoing drug scheme was based on the testimony of undercover agents who testified that on the day in question the seller told them he was getting the drugs from "Wayne", and then proceeded to place a call to a "Wayne" to arrange the sale. The seller then went to Stroupe's home and emerged with drugs.

The government argued that this evidence was sufficient to prove the conspiracy so that later statements tying Stroupe to the conspiracy were admissible. The appellate court disagreed, finding that there was no showing that the call was actually made to Stroupe, or was not merely feigned to use him as an unwitting dupe. Similarly, with reference to the emergence from Stroupe's house with the drugs, the court noted that the drug may have been concealed in the seller's pocket all

along, with the visit to the house being a subterfuge to divert attention from the seller's home or his source of supply.

The opinion issued in the present case fails to recognize this concept of "substantial connection" to an ongoing conspiracy. If this decision is permitted to stand, there is no doubt that it will radically rewrite federal precedent with respect to admission of coconspirator statements. For, all that is needed for proof to comport with the court's decision is the mere existence of a conspiracy without any precise showing of an accused's role therein. Due process requires that this Court correct this error.

II. THE DECISION BELOW AFFIRMING PETITIONERS' CONVICTIONS IS CONTRARY TO PREVAILING LAW AND RESULTS IN A DEPRIVATION OF CONSTITUTIONAL RIGHTS WHERE THE EVIDENCE DID NOT SUFFICIENTLY ESTABLISH THEIR KNOWING PARTICIPATION IN THE CHARGED CRIMES.

In all criminal cases, the government has the responsibility of proving every element of the crime charged beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). This burden is not dependent upon the status of the prosecuting authority, Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979) (due process requires same standard of proof in state criminal proceedings), or the status of the defendant. In Re Winship, supra, (beyond a reasonable doubt burden is applicable in adult and juvenile prosecutions). Yet, in the present case the Eleventh Circuit has imposed an altogether new standard of criminal

responsibility in situations involving mere transporters of contraband under conditions which amount to nothing more than ignorant involvement.

It is submitted that this emerging standard is completely erroneous and contrary to well-established notions of criminal culpability. The conclusion of the appellate court ought to be reviewed for the very simple reason that, if upheld, this standard will impose criminal liability upon every individual who, without being cognizant of any illegal dealings, finds himself unknowingly immersed in the outer fringes of the drug trade. Petitioners should not be made to suffer because of the prevalent societal dissatisfaction with illegal narcotics.

The situation presented for review to this Court is, in a way,

unique; yet, it is controlled by a substantial body of law which, unfortunately, was not correctly applied to the facts. The record of the trial and the opinion of the Eleventh Circuit reveal that Petitioners' sole act of illegality was in delivering four sealed cardboard boxes to the Howard Johnson's motel. There was no evidence that they knew the contents thereof; there was no evidence that they had any prior dealings with the coconspirators. In fact, the proof amply supported Petitioners' contention that they were unwittingly duped into assisting the drug principals by delivering what they believed to be harmless airplane parts.

The court's decision failed to account for the opinion of United States v. DeSimone, 660 F.2d 532, 537 (5th Cir. 1981), and in so doing conflicts therewith. There, DeSimone was charged with

and convicted of various offenses including a scheme to import marijuana into the United States. The evidence against DeSimone showed his close association with persons involved in a criminal enterprise. He was arrested after his attempted flight in the middle of the night from an automobile ditched in a remote area near the Greensboro airport, where a marijuana unloading operation was taking place. The government's theory there, as here, was that of righteous bewilderment that anyone in such a remote area could not be connected to the conspiracy. This caused the court to make the following observation:

> This evidence certainly arouses suspicion, but does it prove beyond a reasonable doubt that DeSimone conspired to import and distribute marijuana. We think not. Obviously, appellant's presence was highly suspicious, but this is not a

> substitute for evidence sufficient to prove beyond a reasonable doubt. Although it is certainly possible -- maybe even probable -- that [the appellant] was involved in the conspiracy, such speculation does not constitute proof beyond a reasonable doubt, and juries 'must not be permitted to convict on suspicion and innuendo.'

Another case which deserves comment is United States v. Scott, 678 F.2d 606 (5th Cir. 1982). There, the Fifth Circuit reversed the convictions of several defendants charged with conspiracy to import marijuana because the proof established merely that they were present on board a vessel which rendezvoused with a drug-laden boat. Commenting that the defendants "may have simply been hired 'to unload a vessel,'" the court held that the "appellants were more like such passengers in an automobile containing concealed contraband as we have in other cases

found innocent of possession." Id. at 611.

The very same observations ring true in this case. As with DeSimone, both NEWTON and TRUXELL found themselves in a compromising situation that might, at first glance, seem to defy reasonable explanation. However, upon the closer inspection that inevitably occurs on appellate review, a reasonable explanation existed inconsistent with a theory of guilt. That view is simply that "Steve" placed Petitioners in a situation where they unknowingly transported boxes of quaaludes to the ultimate destination in Mobile. There is no testimony to show that NEWTON and TRUXELL, "while still in the Ocala Travelodge, stayed in constant contact with the other members of the party in Mobile." 681 F.2d at 1360. The evidence only shows that the unknown

people who rented the particular room at the motel were in communication with the conspirators and that those people checked out of the room the day after NEWTON and TRUXELL were arrested and taken into custody. Thus, the proof establishes that someone <u>else</u>, not NEWTON or TRUXELL but probably "Steve", was the organizer of this conspiracy; it is this person who duped Petitioners into participating.

It is imcumbent upon this Court to review the standard announced by the Eleventh Circuit with regard to sufficiency of proof in cases involving transporters of contraband. Petitioners, to be sure, did not act with an abundance of caution; but neither did they knowingly engage in criminal conduct. Because the court below has totally disregarded the burden of proof imposed by the Constitution upon the

prosecution and has affirmed the convictions on the basis of inadequate understanding of the facts and the law, this Court should grant a writ of certiorari and require the Eleventh Circuit to conform to the mandate of this Court, as issued in Jackson and Winship, that requires a reversal of any judgment based on evidence insufficient to establish to a reasonable jury guilt beyond a reasonable doubt.

III. A SENTENCING COURT'S MECHANICAL IMPOSITION OF MAXIMUM SENTENCES WITHOUT INDIVIDUALIZED CONSIDERATION OF RELEVANT BEHAVIOR CHARACTERISTICS REQUIRES RESENTENCING BEFORE AN IMPARTIAL JUDGE.

Petitioners received the maximum possible punishment for their convictions. The sentencing procedure utilized by District Judge Hand was not a careful analysis of the circumstances

of the case and the individual backgrounds of Petitioners, but rather was simply a mechanical imposition of the maximum sentence in order to avoid any resentencing limitations should the defendants be successful on appeal.[1/] The Eleventh Circuit, while disagreeing with Petitioners that the trial judge's actions did not constitute individualized sentencing discretion, did remand the case for a resentencing hearing before the same judge because of what it perceived as an improper conditional sentencing. We submit that, while resentencing is in order, that act

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[1/] Judge Hand commented as follows:

> If the matter is confirmed [sic] on appeal, I will entertain a Rule 30. If the matter is reversed on appeal, then that [maximum sentences] will allow the next judge that tries the case a free hand to impose what sentence he feels is appropriate in this case.

must be done by another, impartial judge.

The Eleventh Circuit opinion conflicts with several other federal Circuits which, when remanding a case for resentencing because of a judge-initiated sentencing error, required that resentencing occur before a different judge. In United States v. Schwarz, 500 F.2d 1350, 1352 (2d Cir. 1974), the district judge imposed a sentence while employing "a fixed and mechanical approach... rather than a careful appraisal of the variable components relevant to the sentence upon an individual basis." Because of this, the court directed

> that the case be reassigned for sentence by another judge "both for the judge's sake and the appearance of justice..."

Id. In United States v. Long, 656 F.2d 1162 (5th Cir. 1981), resentencing was

ordered before a different judge when the initial jurist failed to consider a presentence report and stated that no report could favorably impact on the appropriate sentence perceived by the court. Also, in United States v. Murphy, 530 F.2d 1, 2 (4th Cir. 1976), where a case was remanded for resentencing in order to provide an opportunity for allocution, the court directed as follows:

> Because of the district judge's failure to accord the appellant the right of allocution, we reverse and remand for resentencing before a different district judge. In view of our disposition of the matter, we need not presently consider the other assignments of error.

A similar result was ordered in United States v. Navarro-Flores, 628 F.2d 1178, 1185 (9th Cir. 1980), for identical reasons:

> ... we are of the opinion that "both for the judge's sake,

and the appearance of justice", see Mawson v. United States, supra at 31, an assignment to a different judge for resentencing is "salutary and in the public interest", see United States v. Bryan, 393 F.2d 90, 91 (2d Cir. 1968). Cf. United States v. Murphy, 530 F.2d 1 (4th Cir. 1976). In a resentencing here on the plea of guilty, the gain in preserving the appearance of fairness outweighs the countervailing considerations of duplicated effort. Where there is no proof of personal bias requiring recusation "our remand does not imply any personal criticism of the sentencing judge". United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977).

The Eleventh Circuit decision fails to account for these interests. Its conclusion conflicts with the decisions cited above and is dangerous precedent for our criminal justice system. In addition to meting out justice in a fair manner, it is imperative that the judiciary be perceived as being fair and unbiased in

appearance. The Eleventh Circuit opinion does not convey that posture. This Court must correct the injustice.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18 day of December, 1982, three copies of the Petition for Writ of Certiorari were delivered by mail to the Solicitor General, Department of Justice, Washington, D.C. 20530, and to the United States Attorney's Office, P.O. Drawer E, Mobile, Alabama 36601.

BENEDICT P. KUEHNE

BENEDICT P. KUEHNE